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JAMES H. McKENNA

*Ex. of Tarsney for D. C.*  
**SUPREME COURT**

OF THE UNITED STATES.

*Filed Dec. 9, 1901.*

OCTOBER TERM, 1901.

No. 17,853

JOHN C. GOODRICH and  
CLARENCE M. BURTON,  
*Plaintiffs in Error.*

vs.

THE CITY OF DETROIT, and  
LOUIS B. LITTLEFIELD, Treas-  
urer of the city of Detroit,  
*Defendants in Error.*

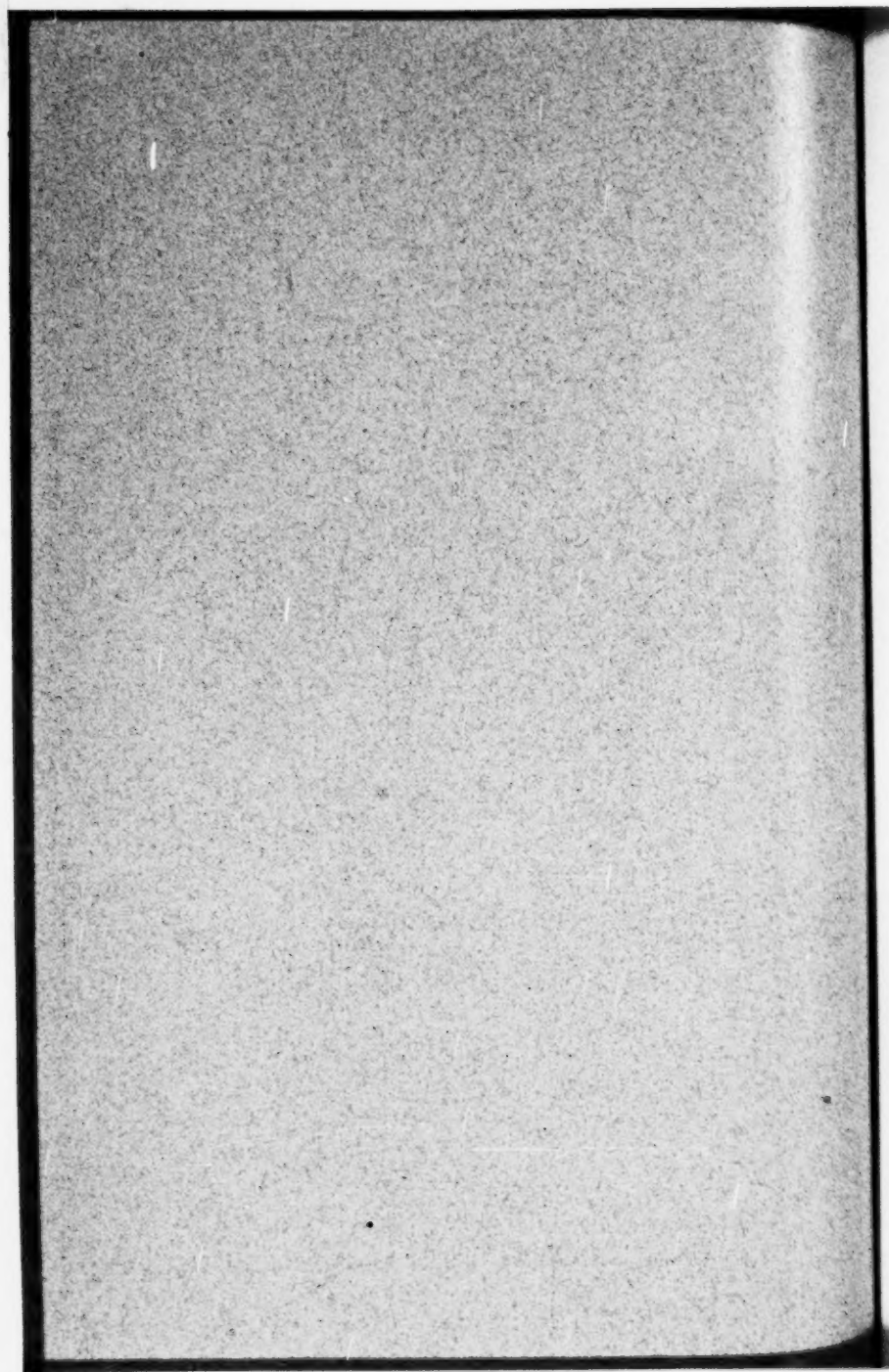
No. 123.

ERROR TO THE SUPREME COURT OF THE  
STATE OF MICHIGAN.

**BRIEF OF TIMOTHY E. TARSNEY, Counsel for  
DEFENDANTS IN ERROR.**

TIMOTHY E. TARSNEY,  
Counsel for Defendants in Error

DETROIT:  
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Treasurer of the City of Detroit,  
*Defendants in Error*

No. 123.

*Error to the Supreme Court of the State of Michigan.*

(17.853.)

## BRIEF FOR DEFENDANTS IN ERROR.

This case comes to this court upon a writ of error from a final decree confirming the decree of the court below, dismissing the complainants' bill of complaint.

Complainants are the owners of certain premises situated in the City of Detroit, including the assessment district fixed and determined by the common council of the City of Detroit upon the several lots and parcels of land within which had been ap-

portioned and assessed the amount of an award made by a jury in condemnation proceedings for the opening of Milwaukee Avenue in said city and the expenses incident thereto.

The validity of the act of the legislature under which the condemnation proceedings were had; the regularity of the proceedings thereunder in the condemnation of certain lands, and the fixing and determining of the assessment district, are called in question by complainants.

The act of the Legislature under which these proceedings were conducted is found in Compiled Laws of Michigan, 1897, Vol. 1, Sections 3392 to 3435. The particular provisions thereof which are in question here, are as follows:

"Sec. 3394: The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council board of trustees or board of supervisors shall be annexed, which certified copy shall be prima facie evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use and benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. A description of the property to be taken shall be given and generally the nature and extent of the use thereof, that will be required in making and maintaining the improvement shall be stated and also the names of the owners and others inter-

ested in the property, so far as can be ascertained, including those in possession of the premises. The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor. The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395: Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition, stating briefly the object of said petition, and commanding them, in the name of the People of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause if any they have, why the prayer of said petition, should not be granted.

"Sec. 3399: The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just. If any such private property shall be subject to a mortgage, lease agreement or other

lien, estate or interest, they shall apportion and award to the parties in interest such portion of the compensation as they shall deem just.

"Sec. 3400: To assist the jury in arriving at their verdict the court may allow the jury, when they retire, to take with them the petition filed in the case and a map showing the location of the proposed improvement, and of each and all the parcels of property to be taken, and may also submit to them a blank verdict which may be as follows: \* \* \*

"Sec. 3406: When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court, affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any of affirmance; and thereupon, the proper and necessary proceedings in due course shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees or board of supervisors, believe that a portion of the city, village or county, in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall by resolution, fix and determine the district or portion of the city (or) village or county benefitted and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may be, to the advantage which such lot,

parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement, when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof? Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city (or) village or county, may become a purchaser at the sale."

On the 14th day of November, 1893, a resolution was adopted by the common council of the City of Detroit, as follows:

"By Alderman Scovel:

Resolved, That the common council of the City of Detroit hereby declare it to be necessary to make a public improvement in the City of Detroit by opening and extending Milwaukee Avenue between Chene Street and Mt. Elliot Avenue, where not already opened, 60 feet wide (Except between the Boulevard and Collins Street where said avenue shall be an average width of 67.10 feet) for the use

and benefit of the public as a public street and highway and that they hereby declare that they deem it necessary to take the private property hereinafter described for such public improvement, to-wit: Opening and extending Milwaukee Avenue between Chene Street and Mt. Elliot Avenue, where not already opened 60 feet wide (Except between the Boulevard and Collins Street, where said avenue shall be an average width of 67.10 feet), for the use and benefit of the public as a public street and highway; that such improvement is for the use and benefit of the public; that the private property which they deem it necessary to take for the purposes of making such improvement, is more particularly described as lying and being in the City of Detroit, County of Wayne, and State of Michigan, bounded as follows: (Here follows description of property.)

(2) It is further resolved by the common council of the City of Detroit that the city attorney be and is hereby directed to institute the necessary proceedings in behalf of the City of Detroit, in the Recorder's Court of the City of Detroit, to carry out the objects of this resolution." (Rec., p. 12.)

January 6th, 1894, the petition of the City of Detroit for the opening and extending of Milwaukee Avenue, in accordance with said resolution was filed in the Recorder's Court, a copy of which petition is printed in the record, Exhibit I, pp. 8-14.

A map or plan of the private property proposed to be taken certified to as correct by the city engineer was made a part of said petition, by the 6th paragraph thereof (Rec., p. 14), which said map or plan was marked Ex. B, printed in the record between pp. 12 and 13.

The owners and persons interested in said real estate proposed to be taken, were duly summoned; a jury was empaneled and such proceedings were taken thereunder that a hearing



thereof was had and a finding made by said jury. (Rec., pp. 15-18.)

It appears from the bill of complaint, paragraph 5, Rec., pp. 3-4, that the verdict of the jury was confirmed by the Recorder's Court. Thereafter, on the 7th day of August, 1894, a resolution was adopted by the common council, which is fully set out in the seventh paragraph of the bill of complaint. (Rec., p. 3.)

This resolution was, on the 20th day of November, 1894, rescinded, and thereafter, on the 22nd day of January, 1895, the following resolution, contained in paragraph 11 of the bill of complaint, Rec., pp. 3-4, was adopted:

"Resolved, That the said common council of the City of Detroit, do hereby fix and determine that the following district and portion of said City of Detroit, to-wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefitted by the opening of Milwaukee Avenue, from Chene Street to the easterly city limits, where not already opened; and further, resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of \$15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of the City of Detroit, be and they are hereby directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the City of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of \$15,214.75 each lot or parcel to be assessed a rateable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements."

March 12th, 1895 the assessors reported an assessment roll, No. 58. for defraying the expenses of opening Milwaukee Avenue, which said assessment was confirmed by the common council April 4, 1895. See paragraphs 12 and 13, Rec., p. 4.

The property of complainants was included in the assessment district so fixed and determined by the common council and was assessed, as stated in the 14th paragraph of the bill of complaint, Rec., pp. 4 and 5.

The complainants filed a bill of complaint in the Circuit Court for the County of Wayne, in chancery. Rec., p. 1-4.

Defendants answered. Rec., p. 19.

After the hearing in said court, a decree was entered dismissing the complainants' bill. Rec., p. 26.

From this decree an appeal was taken to the Supreme Court of the State of Michigan, where the same was affirmed.

The assignment of error, Rec., pp. 38-39 are very general and I will treat the questions discussed in the brief by counsel for the plaintiff in error.

## I.

On page 6 of the brief for the plaintiffs in error, it is stated that the errors relied upon are (1) that the Supreme Court of the State of Michigan erred in sustaining the statute against the objection that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it provides for the taking of property without due process of law; (2) that said court erred in sustaining the proceedings taken under said statute against the objection that they are in conflict with the fourteenth amendment to the constitution of the United States in that they deprived the complainants of property, without due process of law.

Under the first proposition, counsel contends that while the statute provides for notice to parties whose land is to be taken for the street, no provision is made for giving notice to the owners of land liable to be assessed for the improvement. Brief, p. 7.

In this, counsel is clearly mistaken.

Section 3395 directs that upon the filing of the petition in the condemnation proceedings in the court, that the clerk of the court shall issue a summonse against the respondents named in the petition, requiring them to appear before the court at the time named therein and show good cause why the prayer of said petition should not be granted. This notice, or summons is directed to the owners of and persons interested in the land proposed to be taken in the condemnation proceedings. This proceeds the fixing of the assessment district, which cannot be fixed and determined until after the confirmation of the condemnation proceedings, as by Section 3406, it is provided that "when the verdict of the jury shall have been confirmed by the court

\* \* \* it shall be the duty of the clerk of the court to transmit to the common council \* \* \* a certified copy of the verdict of the jury and of the judgment of confirmation \*

\* \* If the common council\* \* \* believe that a portion of the city \* \* \* in the vicinity of the proposed improvement will be benefitted by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of the real estate deemed to be thus benefitted and thereupon, they shall, by resolution, fix and determine the district or portion of the city \* \* \* benefitted and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein."

This is fixing and determining the assessment district; Section 3406 further provides that *"the amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion as near as may be to the advantage which such lot parcel, or subdivision is deemed to acquire by the improvement."* *"The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expenses of a public improvement when a street is graded."*

The determination of the assessments district may, and often does, include lands outside of and other than lands affected by the condemnation proceedings. That is, the condemnation proceedings affect only such parcels as are taken in whole or in part. The assessment district takes in all territory which in the judgment of the common council may be benefitted by the opening of the street, in the vicinity of the proposed improvement; so that it is impossible to give notice in the condemnation proceedings to all persons who are likely to be assessed therefor, because the determination of the assessment district cannot be made until after the condemnation proceedings are ended. But the statute does contemplate that notice shall be given at some stage of the proceedings to all persons who are interested in lands within the assessment district and affected thereby, as indicated in the language above quoted, *"that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expenses of a public improvement when a street is graded."* No contention is made here but that the notice provided for by the charter of the City of Detroit of

the assessment and an opportunity to be heard before the board of assessors was not given.

This is the same notice referred to in the *Voight vs. Detroit*, case, recently heard in this court.

It is contended that the statute is unconstitutional because it authorizes the common council to fix and determine the district claimed to be benefited without providing for any hearing by the parties whose lands are included in the district as to whether all the lands benefited by the improvement are included in the district and whether the tax payers' land should be included in the district or not.

There is no force in this contention.

*Davison vs. New Orleans*, 96 U. S., 97,  
*County of Mobile vs. Kimball*, 102 Id., 691,  
*Hager vs. Reclamation Dis.*, 111 U. S., 701,  
*Spencer vs. Merchant*, 125 U. S., 349,  
*Walston vs. Nevin*, 128 U. S., 578,  
*Williams vs. Eggleston*, 170 U. S., 305.

In this last case, it is said by Mr. Justice Brewer, speaking for the court: "Neither can it be doubted that if the state constitution does not prohibit the legislature, speaking generally, may create a new taxing district, determine what property shall be considered as benefited by a proposed improvement. And in so doing, it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal, as to the question whether the property so included within the taxing district is, in fact benefited."

*Paulson vs. City of Portland*, 149 U. S., 30, an ordinance of the City of Portland was attacked because it assumed to determine arbitrarily and absolutely that the property within the prescribed district was benefited by the construction of a sewer without giving to the owners of the property any notice or opportunity to be heard upon that question, but the charter did provide for notice in case of street assessments and made the provisions applicable in case of sewers where the expense is ordered by the common council to be made a charge on the property directly benefited.

Mr. Justice Brewer said: "By ordinance, 5068, it ordered the construction of a sewer and directed what area should be drained into that sewer and created a taxing district out of that area. For these no notice or assent by the taxpayer was necessary. \* \* \* By the same ordinance, the city also provided that the cost of the sewer should be distributed upon the property within the sewer district and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time in proceedings of this nature where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard."

As before stated, the charter of the City of Detroit provides for notice to persons assessed and an opportunity is given to be heard before the board of assessors. This question was fully discussed in briefs of counsel for the City of Detroit in *Voigt vs. Detroit*.

Upon such hearing before the assessors, sitting as a board of review, the taxpayer no doubt has a right to be heard upon the question whether his property is benefited to the extent to which it is assessed, or whether it is benefited at all, but he has no right to be heard upon the determination of the extent of

the territory to be embraced within the assessment district. This is purely a legislative question, as decided in the last case cited, and is fully discussed in my brief in *Voigt vs. City*.

### III.

Counsel contends that the resolution fixing the assessment district does not expressly state that the property included therein is benefited to the amount ordered to be assessed upon such district.

The resolution declares that "the common council of the City of Detroit do hereby fix and determine that the following district and portion of said City of Detroit is benefited by the opening of Milwaukee Avenue from Chene Street to Mr. Elliot Avenue, where not already opened, and further resolved that there be assessed and levied upon the several pieces and parcels of real estate included in the above description the amount of \$15,214.75, in proportion, as near as may be, to the advantage which such lot or parcel is deemed to acquire by such improvement." (Rec., p. 3-4.)

I think such determination is clearly apparent from the language of the resolution and is a substantial compliance with the statute. The resolution determines that the property "was benefited." It then directs "an assessment to be levied upon each piece or parcel, in proportion as near as may be" is deemed to acquire by making such improvement.

Is it not clear that if each lot is assessed in accordance with the benefit derived from the improvement, that all the lots together are assessed in accordance with the benefits received?

Again, it will be noticed that the resolution referring to the assessment on each lot ends with the phrase, "*in accordance with*

*the amount of benefit derived from such improvement."* If each lot was assessed in accordance with the amount of benefit derived from such improvement, no owner of such lot is entitled to complaint. In fact, there is no complaint that any lot is unfairly or unjustly assessed, nor that the resolution does not provide for a fair assessment nor that the lots assessed are not benefited to the amount of such assessment by reason of the opening of the street, but it is asserted that it simply omits to state that the whole added together is in accordance with the benefit to the whole district.

#### IV.

Counsel contends that one piece of property was defectively described in the condemnation proceedings. Brief, p. 18.

If this question can be considered here, it would be sufficient to point out that a clerical error was no doubt made in one of the descriptions where a line was run S. 64 degrees west, when it should read "N. 64 degrees east."

That the error is a clerical one is made manifest by reference to Ex. B. Rec., pp. 12-13, which was a plat of the lands affected by the condemnation proceedings, which show an accurate description of the land proposed to be taken, and this plat would correct any error there might be in the written description of the parcel referred to. This was the view taken by the Supreme Court of Michigan in its opinion, Rec., p. 21. But such questions were settled by the confirmation of the report and verdict of the jury in the Recorder's Court. That court had jurisdiction of the parties and the subject matter; its judgments cannot be collaterally attacked except for questions affecting its jurisdiction.



The rule is well established by the decisions of this court in *Vorhees vs. Jackson*, 10 Pet., 449, where it is said:

"When proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on direct appeal. The general and well settled rule of law in such cases is that, when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any sort are to be corrected by some direct proceedings, either before the same court to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no protection, and may be rejected when collaterally drawn in question. But the principle that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appear, applies as well to every judgment or decree rendered in the various stages of the proceeding of a court of general jurisdiction, from the institution to their completion as to the final judication. Every matter adjudicated, becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged. Hence the order of a court of general jurisdiction confirming a sale under attachment, upon inspection of the return, is conclusive in any collateral action on the question of the validity of the sale. It may be conceded that the requirements of the statute in reference to the mode of proceeding are conditions precedent to a valid sale; but it is not essential that the record should set forth the various steps necessary to the performance of such conditions. A sale cannot be declared a nullity in a collateral action, because the record does not show affirmatively the evidence of a compliance with the terms prescribed by law in making such sale."

See also to the same effect *Moore vs. Greene*, 19 How., 69; *Ramson vs. Williams*, 2 Wall., 313; *Comstock vs. Crawford*, 3 Wall., 396.

It is respectfully submitted that the decree of the Supreme Court of the State of Michigan should be affirmed.

TIMOTHY E. TARSNEY,

Counsel for defendants in error.